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81-2309

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1981

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

STEVEN HENRY ROBERTS,

Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

WHETHER THE DECISION OF THE ELEVENTH JUDICIAL CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH CHAMBERS V. MARONEY, 399 U.S. 42 (1970); ENGLE V. ISAAC, U.S. 102 S.CT. 1558 (1982) AND UNITED STATES V. DECOSTER, 624 F.2d 196 (D.C. CIR. 1979), AND IS AN ERRONEOUS CONSTRUCTION OF 28 U.S.C. 2254 AND THE EXHAUSTION REQUIREMENT THEREUNDER.

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PREFACE

The Petitioner, Louie L. Wainwright was the Appellee in the Eleventh Circuit Court of Appeals and the Respondent in the United States District Court for the Southern District of Florida. The Respondent, Steven Henry Roberts, was the Appellant in the Circuit Court of Appeals and the habeas petitioner in the District Court. For clarity the parties will be referred to as the State and the Defendant.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the State's Appendix.

I.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is contained in the State's Appendix and is apparently unreported. The Opinion of the Eleventh Judicial Circuit Court of Appeals is reported at Roberts v. Wainwright, 666 F.2d 517 (11th Cir. 1982). There is no official reporter for citation to this opinion.

II.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendment VI of the United States Constitution.

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C 2254 provides inter alia that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of the United States.
>
> * * * * *
>
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indica, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing:

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate

hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a wnole concludes that such factual determination is not fairly supported by the record:

IV

STATEMENT OF THE CASE

The Defendant was originally convicted of rape pursuant to a grand jury indictment, which was subsequently reversed on appeal. See, Roberts v. State, 335 So.2d 285 (Fla. 1976). On remand the Defendant pleaded guilty to attempted rape and was sentenced to ten (10) years probation. A3.

On September 20, 1978 the Defendant was charged with violating the terms of his probation. A4. On July 18, 1979, the Defendant was located and subsequently extradited to Florida. The record reflects that at least on January 23, 1980 the Defendant had counsel and on January 28, 1980, discovery was invoked. A1. The Defendant's probation revocation hearing was March 13, 1980. A1;A4.

On his subsequent Petition for Habeas Corpus relief under 28 U.S.C. 2254 the Defendant's two claims were summarized by the United States District Court thus:

> "As grounds for relief, the Petitioner alleges the following:
>
> 1. That his conviction was obtained by a guilty plea which was not made with knowledge of the consequences of the plea.
>
> 2. Denial of the effective assistance of counsel as his attorney was not afforded time to familiarize himself with the facts and the law of his case."
>
> A3.

With regard to the present petition,[1] although the State did not raise any exhaustion issue the District Court found

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[1] The Defendant's first claim was found to be without any factual predicate and the Defendant did not pursue the issue on appeal. Roberts v. Wainwright, 666 F.2d 517 (11th Cir. 1982).

that the Defendant had exhausted his claims:

> "Following the revocation of his probation and sentence, the Petitioner sought post conviction relief in the state trial court. He states that he raised the same grounds that he raises in the instant petition. That petition was denied in the state court on August 4, 1980. According to his federal petition, he then appealed from the state court order denying post-conviction relief. Apparently the appellate court affirmed the trial court's order denying relief. It appears that the Petitioner has complied with the exhaustion requirement of 28 U.S.C. §2254 (b) in presenting his claims to the state appellate court. Picard v. Connor, 404 U.S. 270 (1971); Lamberti v. Wainwright, 513 F.2d 277 (1975)."

A4.

With regard to the Defendant's latter claim the District Court rejected his claim for relief explaining that:

> "Petitioner's second claim for relief is that he was denied the effective assistance of counsel because

> his attorney was not allowed enough time to become familiar with the legal and factual issues of his case. Petitioner has not stated the manner in which he was prejudiced from this lack of time to prepare. This conclusory allegation of ineffectiveness of counsel without any affirmative demonstration of prejudice is insufficient to show ineffective assistance of counsel. See, United States v. Doran, 564 F.2d 1176 (5th Cir. 1977). Furthermore, the Fifth Circuit has determined that lack of time for preparation will not in itself support a claim of ineffective counsel. Cappetta v. Wainwright, 443 F.2d 1027 (5th Cir. 1970). Petitioner is therefore entitled to no relief as to this claim."
>
> A6-A7.

On appeal to the Eleventh Circuit Court of Appeals the Court reversed the District Court as to the Defendant's claim of ineffective assistance of counsel, reasoning on the basis that it was a pro se petition:

> "Liberally interpreted, we believe that the petition does set forth a claim for relief that warrants further judicial inquiry. Roberts contends that counsel was inadequately prepared to defend him. His charge, if confirmed by the totality of circumstances in the case, would be grounds for granting his petition."
>
> A11-A12.

Although neither party raised any issue on appeal as to exhaustion, the Circuit Court also reversed the District Court as to the exhaustion issue and furthermore in effect ordered that an evidentiary hearing should be conducted upon the present record which is the state court record:

> "If the court finds that Roberts has exhausted his state remedies, it should inquire into the merits of his claim of ineffective assistance. If no state record exists that is adequate for the federal district court to evaluate

> Roberts' claim, that court should hold its own evidentiary hearing."[Footnotes omitted].
>
> A12-A13.

The Circuit Court denied rehearing on March 16, 1982 but stayed its mandate pending review in this Court. A16-A18.

V

SUMMARY OF ARGUMENT

The Circuit Court has manifestly erred in reversing upon the issue of exhaustion of state remedies which was not litigated by anyone below. Exhaustion may be waived and was waived.

The Circuit Courts opinion cuts down the correct standard for the burden of proof upon claims of ineffective counsel in a habeas corpus proceeding. See, United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979); Knight v. State, 394 So.2d 997 (Fla. 1981). Under DeCoster and Knight the specific omission upon the claim of ineffective counsel must be specifically detailed in the defendant's pleading. The burden of showing that the omission prejudiced the defendant is solely upon the defendant. Accordingly, the requirement

of a specific pleading is great. The Court's ruling derogates the requirement under Knight and DeCoster, and is not a sound or correct analysis of the burden of proof and pleading in proceeding under 28 U.S.C. 2254. See, also, Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982), en banc rehearing granted, May 14, 1982.

V

ARGUMENT

The Circuit Court of Appeals has manifestly erred in reversing upon the issue of exhaustion where no party litigated the issue below. The issue of exhaustion may be waived, Barksdale v. Blackburn, 670 F.2d 22 (5th Cir. 1982); Grooms v. Wainwright, 610 F.2d 344 (5th Cir. 1980), cert.den.,___U.S.___, 100 S. Ct. 1605 (1980); Batten v. Scur, 649 F. 2d 564 (8th Cir. 1981), contra, Sweet v. Cupp, 640 F.2d 233 (9th Cir. 1981); Trantino v. Hatrack, 563 F.2d 86 (3d Cir. 1977), cert. den. 435 U.S. 1928 (1977), and the State waived any issue of exhaustion in the present case. This issue has vast importance to the ongoing litigation in the death penalty cases, where the delay in effecting state judgments is causing vase public dissatisfaction and

creating great antagonism and the breakdown of comity between federal and state courts.

The Defendant claimed at "ground two" that he was denied ineffective counsel because counsel was not afforded enough time to familiarize himself with the facts and law of the case. The present Circuit Court opinion in effect requires an evidentiary hearing upon such a bare allegation. To the contrary, summary allegations that counsel did not speak with the Defendant do not make a valid claim of error. See, Chambers v. Maroney, 399 U.S. 42 (1970). In Chambers v. Maroney, the Court rejected without a hearing the defendant's claim that counsel was ineffective because he was only appointed on the day of trial, where the record showed that the defendant had been appointed an attorney earlier than the

first day of trial. 399 U.S. at 53-54. A summary allegation that more time was needed for preparation for trial is insufficient to establish an allegation of prejudice. See, United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978), cert. den. 435 U.S. 955 (1978)(time spent in preparation in and of itself is not a showing of ineffective counsel). Counsel need only consult with his client as often as necessary to provide reasonably competent assistance, considering the nature of the particular case. A short time and even one meeting may suffice to satisfy the constitutional requirement. Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980); Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980); Jones v. Wainwright, 604 F.2d 414 (5th Cir. 1979); United States v. Maguire, 600 F.2d 330 (1st Cir. 1979); Commonwealth v. Fox, 414 A.2d 642 (Pa. 1979)(life

sentence for first degree murder).

Further, in the present case, the present case, the record clearly reflects that the Defendant had counsel and discovery was invoked almost sixty (60) days prior to trial. Under federal and state law the Defendant's bare claims may be summarily rejected without a hearing if they are conclusively refuted by the records. See, Chambers v. Maroney, 399 U.S. 42 at 53-54; Knight v. State, 394 So.2d 997 (Fla. 1981). Summary allegations without factual support are properly denied without a hearing. See, Wainwright v. Sykes, 433 U.S. 72 at 91-92, 97 S.Ct. 2497 at 2508-2509, 53 L.Ed. 594 (1977); State v. Barton, 194 So.2d 241 (Fla. 1967). In Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, at 1576 (1982) Justice Stevens in concurring noted that:

> "A petition for a writ of habeas corpus should be dismissed if it merely attaches a constitutional label to factual allegations that do not describe a violation of any constitutional right. In Part IIA of its opinion, the Court seems to agree with this proposition. See ante, at 1567-1568."

See, also, Cooper v. Fitzharris, 586 F.2d 1325, at 1329 (9th Cir. 1978)(en banc: "The concern that courts would be overburdened with frivolous accusations of incompetent assistance was met by requiring specificity in pleading the inadequacies of counsel's performance and how they prejudiced the accused"). The present cause is no less than an absolute retreat from Justice Stevens observation in Engle v. Isaac, and the fundamental analysis noted in Cooper v. Fitzharris.

The reasoning of the present panel is based upon the analysis in United States

DeCoster, 487 F.2d 1196 (D.C. Cir. 1973) (Baselon, J.)(DeCoster I) and United States v. DeCoster, 624 F.2d 300 (D.C. Cir. 1976) (Bazelon, J.)(DeCoster II). In DeCoster I and II the court relying upon a "check-list" of errors held that these would be ineffective counsel if they were "substantial." The meaning of "substantial" was left ambiguous, but clearly was not related to any effect upon the outcome of the cause. See, 624 F.2d at 215. Recently, in Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982), rehearing en banc granted, May 14, 1982, the court followed the same reasoning as in DeCoster I and II. DeCoster I and II were however overruled in United States v. DeCoster, 196 F.2d 624 (D.C. Cir. 1979)(en banc), cert. den.,___U.S.___, 100 S.Ct. 302 (1980)(hereinafter DeCoster). In the Florida state courts the rule applied herein derives from the landmark decision

in Knight v. State, 394 So.2d 997 (Fla. 1981). In Knight, the Court, relying upon DeCoster, set a four step standard of analysis including the requirement noted above by Justice Stevens and reasoned in Cooper v. Fitzharris, that a Defendant must specifically allege error and prejudice. The present panel opinion abrogates Knight and creates a constitutional crisis between the highest federal court in Florida and the highest state Court in Florida.

WHEREFORE, the Petitioner, LOUIE L. WAINWRIGHT, submits that this Court has jurisdiction and should take jurisdiction over this matter of compelling national importance.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General

A1

[EXCERPT DOCKET SHEET]

In the Circuit Court in and for the Eleventh Judicial Circuit Court, Dade County, Florida

The State of Florida,

vs. No. 73-1860

Steven Henry Roberts

* * *

January 28, 1980 "Discovery"

* * *

Date	Jan. 23, 1980	Jan. 28	March 13, 1980 . . .
State	D. Siegel	do	A. Barnes . . .
Defense	W. Aaron P.D.	do	S. Marks . . . . .

* * *

March 13, 1980 the following proceedings were had on this Cause for a probation violation hearing. Rule invoked.

[State witnesses; exhibits; State rests].

[Defense witnesses; Defense rests].

Court finds Defendant in violation.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-25-CIV-SMA

STEVEN HENRY ROBERTS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary
Department of Offender
Rehabilitation,

Respondent.

_____/

ORDER OF DISMISSAL

Steven Henry Roberts has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254, attacking his sentence of fifteen (15) years imposed by the Circuit Court of the Eleventh Judicial Circuit of Dade County, Florida on March 13, 1980. Roberts was sentenced following a probation revocation hearing.

Petitioner is currently in the custody of the Department of Offender Rehabilitation for the State of Florida.

As grounds for relief, the Petitioner alleges the following:

1. That his conviction was obtained by a guilty plea which was not made with knowledge of the consequences of the plea.

2. Denial of the effective assistance of counsel as his attorney was not afforded time to familiarize himself with the facts and the law of the case.

Petitoner was initially tried and convicted of rape in case number 74-1860. On appeal the Supreme Court of Florida reversed his conviction. Roberts v. State, 335 So.2d 285 (Fla. 1976). Upon remand to the trial court he entered a guilty plea to a charge of attempted rape and received a sentence of ten years probation on September 24, 1976.

On September 20, 1978, the Petitioner was charged with violations of the terms of his probation. Following a full hearing, during which he was represented by counsel, the Petitioner's probation was revoked and on March 13, 1980, he was given a fifteen (15) year sentence. Following the revocation of his probation and sentence, the Petitioner sought post conviction relief in the state trial court. He states that he raised the same grounds that he raises in the instant petition. That petition was denied in the state court on August 4, 1980. According to his federal petition, he then appealed from the state court order denying post-conviction relief. It appears that the Petitioner has complied with the exhaustion requirement of 28 U.S.C. §2254(b) in presenting his claims to the state appellate court. Picard v. Connor,

404 U.S. 270 (1971); Lamberti v. Wainwright, 513 F.2d 277 (1975).

Although the Petitioner claims that he pled guilty without knowledge of the consequences of his plea, his confinement is not the result of his plea of guilty. Rather the Petitioner received his fifteen year sentence following the revocation of his probation. He did not plead guilty to the charges of the probation violation affidavit, but rather was found guilty following a full hearing in the state trial court. At that hearing, he presented witnesses and evidence in his own defense. He was represented by counsel. (Respondent's Composite Exhibit D).

Therefore, this first contention of the Petitoner's is without merit. He has not alleged failure to comply with the minimal due process requirements for a revocation of probation. It appears that all of these due process requirements have

been met. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 788 (1973). Therefore, his claim of an involuntary guilty plea entitles him to no relief.

Petitioner's second claim for relief is that he was denied the effective assistance of counsel because his attorney was not allowed enough time to become familar with the legal and factual issues of his case. Petitioner has not stated the manner in which he was prejudiced from this lack of time to prepare. This conclusory allegation of ineffectiveness of counsel without any affirmative demonstration of prejudice is insufficient to show ineffective assistance of counsel. See, United States v. Doran, 564 F.2d 1176 (5th Cir. 1977). Furthermore, the Fifth Circuit has determined that lack of time for preparation will not in itself support a claim of ineffective counsel. Cappetta v.

Wainwright, 443 F.2d 1027 (5th Cir. 1970). Petitioner is therefore entitled to no relief as to this claim.

For the foregoing reason, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is Denied.

DONE AND ORDERED at Miami, Florida, this ____ day of ___, 1981.

UNITED STATES DISTRICT JUDGE

CC: Steven H. Roberts, A-04449
P. O. Box 667-A-139
Bushnell, Florida 33513

Calvin L. Fox, Esquire
Asst. Attorney General
401 N.W. 2nd Avenue,
Suite 820
Miami, Florida 33128

Steven Henry ROBERTS, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary of Florida Department of Correction and Rehabilitation and Etc., Respondent.

No. 81-5648

Non-Argument calendar.

United States Court of Appeals,

Eleventh Circuit.

Jan. 22, 1982.

Steven H. Roberts, pro se.

Calvin L. Fox, Asst.Atty.Gen., State of Fla., Miami, Fla., for respondent.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

Steven Roberts pleaded guilty to attempted rape. A Florida State court sentenced him to ten years' probation on condition that he be incarcerated for two and one-half years. After his release from incarceration, he was charged with

violating the terms of his probation. Following a full hearing, Robert's probation was revoked and he was sentenced to fifteen year's imprisonment.

Roberts subsequently filed a petition for habeas corpus pursuant to 28 U.S.C.A. §2254, alleging that his guilty plea to attempted rape was made without knowledge of the consequences of the plea and that he was denied effective assistance of counsel because counsel had insufficient time to familiarize himself with the facts and law of the case. The district court, proceeding upon the basis that appellant had exhausted state remedies, dismissed Roberts' petition.[1] Roberts' present incarceration, the court ruled, was the result not of his guilty plea to attempted

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[1] It is not at all clear that Roberts had in fact exhausted his state remedies as required by 28 U.S.C.A. §2254(b).

rape but of his violation of probation requirements. For that violation he did not plead guilty and was represented by counsel before a full hearing in state court. The district court held that Roberts' claim of an involuntary plea would, therefore, entitle him to no relief. Turning next to Roberts' claim that he was denied effective assistance of counsel, the court found that petitioner had not shown how he was prejudiced from his counsel's lack of time to prepare and ruled that his allegation of ineffective assistance was too conclusory to set out a claim for relief. The court, without a hearing, held that claim without merit.

On appeal, Roberts does not contest the lower court's dismissal of his claim that he entered a guilty plea without knowledge of the consequences. We consequently deem that claim abandoned. Red v. Blackburn, 636 F.2d 1027, 1028 (5th Cir. 1981).

We do, however, disagree with the district judge's conclusion that Roberts' claim of ineffective assistance was too conclusory to merit consideration. Initially, we observe that a court should interpret a pro se petition such as Roberts' more liberally than it might interpret a petition by an attorney. Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1971); Dupart v. United States, 541 F.2d 1148, 1150 (5th Cir. 1976); Haggard v. Alabama, 494 F.2d 1187 (5th Cir. 1974). Liberally interpreted, we believe that the petition set forth a claim for relief that warrants further judicial inquiry. Roberts contends that counsel was inadequately prepared to defend him. His charge, if confirmed by the totality of circumstances in the case, would be grounds for granting his petition. See Baty v. Balkcom, 661 F.2d 391 at 393-395 (5th Cir. 1981);

Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). We note, moreover, that the cases the district court cites, United States v. Doran, 564 F.2d 1176, 1177-78 (5th Cir. 1977), cert. denied, 435 U.S. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978), and Cappetta v. Wainwright, 433 F.2d 1027, 1029-30 (5th Cir. 1970), rejected claims of ineffective assistance only after an examination of the record disclosed no prejudice. Unlike the district court, they did not reject the petitioner's claim without consideration of its merits.

The district court on remand should determine whether Roberts has in fact exhausted his state remedies and so should be permitted to file a habeas corpus petition in federal court. See Bufalino v. Reno, 613 F.2d 568, 570 (5th Cir. 1980). If the court finds that Roberts has exhausted his state remedies, it should inquire into the merits of his claim of

ineffective assistance.[2] If no state record exists that is adequate for the federal district court to evaluate Roberts' claim,[3] that court should hold its own evidentiary hearing. See, e.g, Townsend

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[2] It is not altogether clear from Roberts petition whether he is claiming ineffective assistance by counsel's advising him to plead guilty to attempted rape or by counsel's representing him at his probation hearing. The precise nature of Roberts' claim should be developed on remand. We do not reach here the issue of whether a claim of ineffective assistance by counsel's advising him to plead guilty is moot because his confinement is not the result of his guilty plea but rather of his violation of probation. We observe, however, that we have held that federal courts have jurisdiction to hear habeas corpus petitions "if there is a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration." Sinclair v. Blackburn, 599 F.2d 673, 676 (5th Cir. 1979), cert. denied, 444 U.S. 1023, 100 S.Ct. 684, 62 L.Ed.2d 656 (1980); see also Escobedo v. Estelle, 655 F.2d 613, 614 (5th Cir. 1981).

[3] Roberts contends that he should have only the burden of showing possible lines of inquiry that counsel had he had more time might have pursued. If he meets that burden, Roberts asserts that there should be a rebuttable presumption of

v. Sain, 372 U.S. 293, 313, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963); Williams v. Blackburn, 649 F.2d 1029, 1021 (5th Cir. 1981); Burden v. Alabama, 584 F.2d 100, 102 (5th Cir. 1978).

The judgment of the district court is REVERSED and REMANDED for proceedings consistent with this opinion.

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prejudice. Such is not the law. The burden of proof for showing ineffective assistance of counsel is, and remains, on petitioner throughout a habeas corpus proceeding. See, e.g., Jones v. Estelle, 632 F.2d 490, 491, (5th Cir. 1980); Rhodes v. Estelle, 582 F.2d 972, 973 (5th Cir. 1978).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

NO. 81-5648

STEVEN HENRY ROBERTS,

Petitioner-Appellant,

vs.

LOUIE L. WAINWRIGHT, Etc., Et. Al.,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING

Before GODBOLD, Chief Judge, FRANK M. JOHNSON, JR., and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5648

STEVEN HENRY ROBERTS,

Petitioner,

versus

LOUIE L. WAINWRIGHT, Secretary
of Florida Department of Correction
and Rehabilitation and ETC,

Respondent.

Appeal from the United States District
Court for the Southern District of Florida

O R D E R:

* * *

The motion of APPELLEE, LOUIE L. WAINWRIGHT for X stay ___recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk

of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

RECEIVED
JUL 1 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CASE NO. 81-2309

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1981

LOUIE L. WAINWRIGHT,

Petitioner,

-VS-

STEVEN HENRY ROBERTS,

Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

BRIEF OF RESPONDENT

COUNSEL OF RECORD

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PRO SE

QUESTION PRESENTED FOR REVIEW

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IN ROBERTS VS. WAINWRIGHT, 666 F.2d 517 (11th Cir. 1982) IS CORRECT AND IS NOT IN DIRECT CONFLICT WITH CHAMBERS VS. MARONEY, 399 U.S. 42 (1970); ENGLE VS. ISAAC, ____U.S._____, 102 S.Ct. 1558 (1982) AND UNITED STATES VS. DECOSTER, 624 F.2d 196 (D.C. Cir. 1979), AND IS NOT AN ERRONEOUS CONSTRUCTION OF 28 U.S.C. 2254 AND THE EXHAUSTION REQUIREMENTS.
(Rephrased)

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STATEMENT OF CASE

Following the return of an indictment for rape, Respondent was convicted and sentenced to the Department of Corrections for a term of thirty (30) years.

His rape conviction was subsequently reversed on appeal in Roberts vs. State, 335 So.2d 285 (Fla. 1976). On remand to the trial court, Respondent pleaded guilty to attempted rape on September 24, 1976, and was placed on probation for a period of ten (10) years.

On September 20, 1978, an affidavit was issued charging Respondent with violating the conditions of his probation. On March 13, 1980, Respondent's probation was revoked. At the conclusion of the revocation hearing, Respondent was sentenced to the Florida Department of Corrections for a term of fifteen (15) years.

After unsucessfully attempting to vacate the judgement and sentence entered by the State of Florida, Respondent filed federal petition for a writ of habeas corpus pursuant to Title 28 United States Code 2254,

claiming:

1. Conviction obtained by plea of guilty which was not made voluntarily with knowledge of the consequences.

2. Denial of effective assistance of counsel.

On May 28, 1981, the District Court ruled that Respondent's first claim was without merit and that Respondent was entitled to no relief as to his second claim, since he failed to demonstrate with specificity, in what way he was prejudiced by counsel's performance. In addition, the District Court found that Respondent had complied with the exhaustion requirements of Title 28 United States Code 2254, in presenting his claims to the Florida Courts.

Respondent then appealed to the Eleventh Circuit Court of Appeals, claiming that the District Court error in denying his habeas corpus petition and error as a matter of law in dismissing the petition without an federal evidentiary hearing. No question of exhaustion was argued on appeal, since the District Court

properly found that Respondent had complied with the exhaustion requirements.

On January 22, 1982, the Court of Appeals for the Eleventh Circuit, reversed. Roberts vs. Wainwright, 666 F.2d 517 (11th Cir. 1982).

The Petitioners then filed Motion for Rehearing, claiming that the Eleventh Circuit decision in the instant case permitting evidentiary hearing, cut across the correct standard of proving ineffective assistance of counsel in habeas corpus proceedings.

On March 16, 1982, the Eleventh Circuit Court of Appeals denied rehearing. On April 21, 1982, the Eleventh Circuit Court of Appeals, granted Petitioner's Motion to Stay Mandate.

SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals did not reversed the District Court as to exhaustion of State remedies under Title 28 United States Code 2254, thus, no erroneous construction of the exhaustion requirements could possibly exist.

Furthermore, the Eleventh Circuit Court of Appeals was correct in reversing the District Court and requiring an evidentiary hearing, since Respondent's claim of ineffective assistance of counsel, which if true, would be grounds for granting his pro se petition, was not altogether clear. Petitioner has failed to demonstrate a direct conflict necessary for the invocation of the Court's jurisdiction.

ARGUMENT

The Eleventh Circuit Court of Appeals did not reversed the District Court as to exhaustion of State remedies under Title 28 United States Code 2254 (c), thus, no error was committed. In Roberts vs. Wainwright, 666 F.2d 517 (11th Cir. 1982) the Eleventh Circuit ruled in part:

> "We do, however disagree with the district judge's conclusion that Roberts' claim of ineffective assistance was too conclusory to merit consideration. Initially, we observe that a court should interpret a pro se petition such as Roberts' more liberally than it might interpret a petition by an attorney. Haines vs. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1971); Dupart vs. United States, 541 F.2d 1148 (5th Cir. 1976); Haggard vs. Alabama, 494 F.2d 1187 (5th Cir. 1974). Liberally interpreted, we believe that the petition set forth a claim for relief that warrants further judicial inquiry. Roberts contends that counsel was inadequately prepared to defend him. His charge, if confirmed by the totality of circumstances in the case, would be grounds for granting his petition. See Baty vs. Balkcom, 661 F.2d 391 at 393-395 (5th Cir. 1981); Gaines

> vs. Hopper, 575 F.2d 1147 (5th Cir. 1978). We note, moreover, that the cases the district court cites, United States vs. Doran, 564 F.2d 1176, 1177-78 (5th Cir. 1977), cert. denied, 435 U.S. 928, 98 S.Ct. 1498, 55 L. Ed. 2d 524 (1978) and Cappetta vs. Wainwright, 433 F.2d 1027, 1029-30 (5th Cir. 1970), rejected claims of ineffective assistance only after an examination of the record disclosed no prejudice. Unlike the District Court, they did not reject the Petitioner's claim without consideration of its merit.
>
> The district court on remand should determine whether Roberts has in fact exhausted his state remedies and so should be permitted to file a habeas corpus petition in federal court. See Bufalino vs. Reno, 613 F.2d 568, 570 (5th Cir. 1980). If the Court finds that Roberts has exhausted his state remedies, it should inquire into the merits of his claim of ineffective assistance.

As a reminder, the Court of Appeals for the Eleventh Circuit did not reversed as to exhaustion. As a foundation for inquiring into the merits of Respondent's claim of ineffective assistance of counsel, the Eleventh Circuit simply directed the District

to determine if Respondent had in fact exhausted his state remedies so as to be permitted to file for habeas corpus relief in the federal court. See, Title 28 U.S.C. 2254 (b); Fay vs. Nois, 372 U.S. 391 (1963) and Lerma vs. Estelle, 585 F.2d 1297 (5th Cir. 1978). No erroneous construction of the exhaustion requirements occured in the decision complained of.

Furthermore, the Eleventh Circuit Court of Appeals was correct in reversing the District Court and requiring an evidentiary hearing, since Respondent's pro se claim of ineffective assistance of counsel, which if true, would be grounds for granting the petition,[1] was not altogether clear. Roberts, supra, at page 519.

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1 /. In Brooks vs. Texas, 381 F.2d 619 (5th Cir. 1967) and Roberts vs. Dutton, 368 F.2d 465 (5th Cir. 1966), the Fifth Circuit Court of Appeals had sustained ineffective assistance claims on the basis that the attorneys could have done more had they had more time.

Relying on Chambers vs. Maroney, 399 U.S. 42 (1970), Petitioner contends that Respondent's claim of ineffective assistance of counsel was to bare to warrant an evidentiary hearing and was properly treated summarily by the District Court. Wainwright vs. Sykes, 433 U.S. 72 (1977). To the contrary, federal evidentiary hearings are required under the standards incoporated in Title 28 U.S.C. 2254 (d), unless the state-court trier of fact has after a full hearing reliably found the relevant facts. See, Townsend vs. Sain, 372 U.S. 293 (1963).

In the instant case, no state records exist that was adequate for the District Court to properly evaluate Respondent's pro se claim of ineffective-counsel. In fact, Respondent 's claim of ineffective assistance of counsel was summarily rejected by the Florida Courts. Roberts vs. State, 388 So.2d 348 (Fla. 3rd DCA 1980). Unlike the District Court below, claims of ineffective assistance has been summarily rejected only after an examination of the records. See, Cappetta vs. Wainwright, 433 F.2d 1027 (5th Cir. 1970) and United States vs. Doran, 564 F.2d 1176 (5th Cir. 1977).

Accordingly, the Eleventh Circuit Court of Appeals without creating a conflict with Chambers, supra, correctly reversed the District Court on this point.

In addition, Petitioner also contends that the decision in Roberts "cuts down the correct standard for the burden of proof upon claim of ineffective counsel in a habeas corpus proceeding," under United States vs. Decoster, 624 F.2d 196 (D.C. Cir. 1979) and Knight vs. State, 394 So.2d 997 (Fla. 1981).

Like the exhaustion issue, the Court of Appeals for the Eleventh Circuit did not reversed the District as to specificity in pleading ineffectiveness of counsel and how counsel's performance prejudiced the Respondent. In fact, the Eleventh Circuit made it explicitly clear and in unmistakable terms that the burden of proof for showing ineffective assistance of counsel is, and remains, on Respondent Roberts throughout habeas corpus proceeding. Roberts, supra, footnote 3, at page 519.

Thus, the Court of Appeals decision in Roberts,

did not cut down in any degree, the standard of proving claims of ineffective assistance of counsel. Moreover, the adjudication of the Knight standard in Florida state courts, cannot, in habeas corpus proceeding under Title 28 U.S.C. 2254 be accepted as binding. Brown vs. Allen, 344 U.S. 443 (1953).

CONCLUSION

Based on Respondent's Brief, it is prayed that the Petition for a Writ of Certiorari be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Brief has been forward to CALVIN L. FOX, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, by U.S. Mail, this 29 day of June, 1982.

Steven Henry Roberts

Steven Henry Roberts
#A044449
Sumter Correctional Institution
Post Office Box 667 B-136
Bushnell, Florida 33513

Pro se

NOTARY PUBLIC CERTIFICATE

STATE OF FLORIDA)
) SS:
COUNTY OF SUMTER)

Sworn to and subscribed before me, the undersigned Notary Public of the State of Florida, this 17 day of June, 1982.

Janet L. Schatt
Notary Public Signature

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JUNE 28, 1986
BONDED THRU MURDEN-ASHTON, INC.

My commission expires: _____

RECEIVED
JUL 1 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1981

LOUIE L. WAINWRIGHT,
Petitioner,
vs.
STEVEN HENRY ROBERTS,
Respondent.

CASE NO. 81-2309

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

COMES NOW Respondent, STEVEN HENRY ROBERTS, pursuant to Title 28 United States Code 1915 and Rule 46, Rules of the United States Supreme Court, and move the Court for permission to proceed in the above-styled cause without prepayment of costs and in forma pauperis. Respondent has attached his affidavit of poverty contesting his indigency.

Respectfully submitted,

Steven Henry Roberts

Steven Henry Roberts
#044449
Sumter Correctional Institution
P.O. Box 667
Bushnell, Florida 33513
B-136

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been fowarded by U.S. Mail to Calvin L. Fox, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami Florida 33128, on this 29TH day of JUNE, 1982.

Steven H. Roberts

NOTARY PUBLIC CERTIFICATE

STATE OF FLORIDA)
) SS:
COUNTY OF SUMTER)

Sworn to and subscribed before me this day, the undersigned Notary Public of the State of Florida, County of Sumter, this 29TH day of JUNE, 1982.

Notary Public Signature

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JUNE 28, 1986
BONDED THRU NATIONAL-ASHTON, INC.

My commission expires: _____

RECEIVED
JUL 1 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT OF POVERTY

LOUIE L. WAINWRIGHT,
Petitioner,
vs.
STEVEN HENRY ROBERTS,
Respondent.

CASE NO. 81-2309

I, STEVEN HENRY ROBERTS, Respondent, being first duly sworn, depose and say that in support of my Motion for Leave to Proceed in Forma Pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore and that I believe I am entitled to redress.

1. I am presently unemployed and has been unemployed since March 13, 1980.

2. I have not received any income from any business, profession or forms of self-employment within the past twelve months.

3. I own no real estate, stocks, bonds, notes, automobiles or other valuable property.

4. I own no checking or savings account.

5. The following persons are dependent upon me for support:

1. Shawn T. Roberts / Daughter

2. Lateesha Roberts / Daughter

I understand that a false statement or answer to any questions in this affidavit will subject me to the penalties for perjury.

Respectfully submitted,

Steven Henry Roberts
#044449
Sumter Correctional Institution
P.O. box 667
Bushnell, Florida 33513
B-136

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been fowarded by U.S. Mail to Calvin L. Fox, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, on this 29TH day of June, 1982.

Steven Henry Roberts

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) SS:
COUNTY OF SUMTER)

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Notary Public Signature

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JUNE 28, 1986
BONDED THRU MURDEN-ASHTON, INC.

My commission expires: